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No. 75-905

In the Supreme Court of the United States

OCTOBER TERM, 1975

NICK SENAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 23, 1975. A petition for rehearing was timely filed and denied on November 25, 1975.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 23, 1975. A timely petition for rehearing was filed and denied on November 25, 1975. The order denying the petition for rehearing appears as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In February, 1972, a Federal grand jury returned a five count indictment against the petitioner, a public defender for Lake County, Indiana. The indictment charged that the petitioner, while acting under color of law, willfully and unlawfully exacted and took money from various persons, thereby willfully depriving those persons of their right under the Fourteenth Amendment, not to be deprived of property without due process of law, in violation of 18 U.S.C. 242. The pertinent part of that statute provides as follows:

> "Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, territory or district, to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of the United States . . ." (is guilty of an offense)

The indictment is reproduced as Appendix B. Prior to trial, one count was dismissed. At the close of the Government's case in chief, a motion for judgment of acquittal was sustained as to another count and, of the three counts that were submitted to the jury, the jury found the petitioner guilty of two counts and not guilty of one.

The counts were submitted to the jury and those of which the petitioner was found guilty charge the petitioner that, notwithstanding his appointment under Indiana law

as a pauper attorney, the petitioner exacted fees from a friend and relative of persons he had been appointed to represent by threatening inadequate legal representation unless extra sums were paid to him. The questions presented are:

1. Is a pauper attorney, by virtue of his appointment to represent an indigent client, acting under color of State law so as to be subject to the provisions of 18 U.S.C. 242?
2. Does a pauper attorney who allegedly threatens inadequate legal representation of persons he has been appointed to defend unless he is paid a fee by a relative or friend of those persons, deprive those persons who pay him such money of property without due process of law?
3. Does the admission of a witness' statement as past recollection recorded made three years after the event constitute reversible error?
4. Was the argument of Government's counsel so prejudicial as to necessitate the grant of a new trial?

STATUTES INVOLVED

The statutes involved are as follows:

Burns' Ind. Stat. 4-5716, Vol. 2, Part 4, 1968 Replacement which provides as follows:

> "Public defenders—authority to appoint—recovery for services—The Judge of the Criminal Court or any division thereof in the counties having a population of 400,000 or more according to the last preceding United States census in which a separate criminal court is established is hereby authorized to appoint one or

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more public defenders as he may deem necessary to defend any poor person accused of the commission of a crime and not having sufficient means to employ an attorney at law to defend himself or herself: provided, however, that the county attorney shall bring suit on behalf of the county at the request of the judge of said court or any division thereof for recovery of a reasonable sum for the service of the public defender rendered on behalf of any such poor person whenever it appears to the Court that said person has sufficient means to employ an attorney. All amounts so recovered shall be paid into the county general fund."

18 U.S.C. 242 provides as follows:

"Whoever, under color of any law, statute . . . wilfully subjects any inhabitant of any State, territory or district, to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than one thousand dollars or imprisoned not more than one year or both . . ."

42 U.S.C. 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment Ten, Rights reserved to States or people—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

STATEMENT OF FACTS

On May 7, 1971, an indictment was returned against the petitioner in the United States District Court for the Northern District of Indiana charging him in five counts with violation of Title 18 U.S.C. Sec. 242. A motion to dismiss was addressed to the indictment and, on October 19, 1971, the District Court entered an order sustaining the motion.

The Government initiated an appeal but subsequently abandoned it. On February 10, 1972, an indictment was returned charging the petitioner with the same five counts in the original indictment; the phrasing of each count of the indictment was charged by charging that the petitioner wilfully and unlawfully exacted money from the persons named in each count of the indictment.

A second motion to dismiss was addressed to the indictment and, on March 27, 1972, the motion was sustained and that indictment was also dismissed. The Government appealed and, on April 24, 1973, the Court of Appeals reversed and re-instated the indictment. *U.S.* v. *Senak* (1973) 477 F. 2d 304, Cert. denied 94 S. Ct. 157, 414 U.S. 856.

Trial by jury commenced on October 7, 1974, and was concluded on October 10, 1974. Prior to the commencement of the trial, the Government dismissed one count of the indictment. At the conclusion of the Government's case in chief, the Court sustained a motion for judgment of acquittal as to another count of the indictment. The three remaining counts were submitted to the jury and the jury returned a verdict finding the defendant guilty of two counts and not guilty of one count. The defendant was sentenced to a term of imprisonment of sixty days on each

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count and fined One Thousand ($1,000.00) Dollars on each count; the imprisonment to run concurrently and the fines cumulative.

Count IV of the indictment named Honore Gilarski as a person who was unlawfully deprived of property without due process of law by the defendant. The defendant represented a friend of hers, Laposi, in two matters in the criminal court wherein he was charged with rape and assault and battery with intent to gratify sexual desires. Laposi had directed Gilarski to contact the defendant; she did not know he was a pauper attorney. After testifying briefly about a telephone conversation she had with the defendant where the defendant told her that Laposi didn't have much of a chance but that if she came up with some money he would have a better chance, she was unable to recall any further conversation that took place between them.

She had been interviewed by two F.B.I. Agents on February 11, 1971, almost three years after the events took place between herself and the defendant. The interview lasted for about two hours and, at the conclusion of the interview, she was handed a two page statement which she signed. During the course of her testimony, she was permitted to review the statement to refresh her recollection and, after examining the statement, it did not refresh her recollection. The Government then moved to admit the statement as past recollection recorded. After vigorous objection and considerable colloquy between the Court and counsel, the statement was admitted, read to the jury and, when the jury retired to deliberate, the statement was given to them along with all the other exhibits.

The statement recited that the defendant called her and asked her to pay Five hundred ($500.00) Dollars to de-

fend Laposi, sometime in the Spring of 1968; she made the payment of Three Hundred ($300.00) Dollars to him on May 29, 1968, and was to pay the remainder before trial; the defendant, at no time, guaranteed the payment would get Laposi off but that Laposi didn't have a chance if she didn't pay him; in June of 1968, she paid the defendant an additional Two hundred fifty ($250.00) Dollars; Laposi was found not guilty. At that time, following the bench trial, defendant asked her for an additional Seven hundred ($700.00) Dollars for the other charge and told her that the money was to be split between a couple of other people. She could only pay about Three hundred fifty ($350.00) Dollars and the charges for the second trial were dropped because of the failure of the prosecution witnesses to appear. In neither case was Judge McKenna presiding.

During the cross-examination of the defendant, the Government was permitted, over objection, to allude to a criminal tax fraud investigation of the defendant and to develop specific instances where he had failed to report income. The instances where he had failed to report income were not the subjects of the indictment. The income involved in one instance was One hundred ($100.00) Dollars and the income involved in another instance was Nine hundred ($900.00) Dollars. The investigation did not result in an indictment. The defendant had agreed to a deficiency for the years in question.

To offset the unfavorable inference that this line of questioning developed, the defendant on re-direct examination testified that he had voluntarily turned over all of his books and records to the Internal Revenue Service, had answered all questions put to him by the agents, and had cooperated fully with the agents of the Internal Revenue Service. He further testified that as a criminal de-

fense lawyer he knew he had the right to withhold such information and would not have turned over his books and records if he knew that he had wilfully misrepresented or understated his income.

In the final argument, the Government, in its opening, adverted generally to the evidence of guilt and referred to the parade of character witnesses and stated

> "Those witnesses did not look at Nick Senak's tax returns or did not talk to his clients."

Defense counsel, in his summation, commented that the conduct of the defendant in cooperating fully with the Internal Revenue Service by turning over his books and records and by making statements negated any wrongdoing, particularly since as a criminal defense lawyer he knew he had the right to withhold such information. In the Government's closing argument, Government counsel commented again that the defendant failed to report his fees and that the defendant's conduct in turning over his books and records and being cooperative with the Internal Revenue Service was meaningless since the defendant knew the information could be obtained by subpoena, that this showed guilty knowledge.

Strenuous objection was interposed by the defendant on two occasions. The Court not only denied the objection on each occasion, but added gratuitously that defense counsel's commen[t] was erroneous.

REASONS FOR GRANTING THE WRIT

A.

THE PETITIONER WAS NOT ACTING UNDER COLOR OF LAW.

The petitioner was not charged with denying any client he had been appointed to represent the effective assistance of counsel. When the case was finally submitted to the jury, the persons who were the alleged victims of his misconduct were not persons he had been appointed to represent but friends or relatives of persons he had been appointed to represent.

This case marks the first time that any pauper attorney has been charged under Sec. 242 in this manner. There have, however, been a number of cases brought under the provisions of 42 U.S.C. 1983, the civil counterpart of Sec. 242, and which is *in pari materia* with Sec. 242. Those cases have expressly and unequivocally held that a pauper attorney is not acting under color of law so as to be subject to a civil action for deprivation of rights.

In *Espinoza* v. *Rogers*, 470 F. 2d 1174 (10th Cir. 1972), an action was brought under 42 U.S.C. 1983, against the defendants in their capacities as attorneys for the Colorado Public Defender's Office. The plaintiff claimed that he was denied due process and equal protection of the laws because the defendants had grossly mishandled his defense.

In a per curiam opinion, the Court of Appeals held:

> "It is well settled that in order for a defendant to be liable under the Federal Civil Rights Act he must have acted under color of State law to cause the denial of a

federally protected right. The Colorado Office of State Public Defender derives its existence from Colorado statutes. These statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally, a Colorado Public Defender's professional duties and responsibility towards his clients are identical in all respects to any other Colorado attorney, whether privately retained or court-appointed. Therefore, we hold that an attorney does not act under color of State law simply because he has accepted employment as a Colorado Public Defender . . ." (At Page 1174, 1175)

The Court of Appeals for the Fifth Circuit has held to the same effect in *Obrien* v. *Colbath*, 465 F. 2d 358 (1972) stating:

". . . In our opinion (Sec. 1983) was never intended as a vehicle for prosecuting malpractice suits against court-appointed attorneys . . ." (at Page 1155, See also *Nelson* v. *Stratton*, 469 F.2d 1155, 5th Cir. 1972) (Civil Rights Action against privately retained attorney dismissed on ground that attorney was not acting under color of State law).

In *Szijarto* v. *Legeman*, 466 F. 2d 864, (9th Cir. 1972) the Court of Appeals upheld a dismissal of a civil rights action brought under Sec. 1983 against the plaintiff's retained attorney for alleged failure to render him reasonable assistance during the course of a State criminal trial.

In a per curiam opinion, the Court stated:

"That this circuit, in common with others, has held that such a claim is not within the purview of the Civil Rights Act. The reason being that an attorney *whether retained or appointed* does not act under color of State law; hence, the claim is not one coming within the jurisdiction of the District Court." (our emphasis)

The Court of Appeals for the Seventh Circuit has held that a court-appointed lawyer is not acting under color of State law so as to be responsive in a suit for damages brought under Sec. 1983, *French* v. *Corrigan*, 432 F. 2d 1211 (7th Cir. 1970), stating:

> ". . . Just as the prosecutors did not lose their immunity by reason of the alleged conspiracy, neither were the acts of Corrigan done under color of law. They were appointed by the trial judge to represent plaintiff on his requested appeal, they were not functionaries of the State, they were proceeding in their private capacity acting on plaintiff's behalf. . ." (at page 1214)

In *Jones* v. *Jones*, 410 F. 2d 365 (7th Cir. 1969), the Court of Appeals upheld an order dismissing the plaintiff's complaint in a civil rights action brought under Sec. 1983, brought by the plaintiff against his counsel in a criminal proceeding stating:

> ". . . Lawyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of State law within the meaning of 42 U.S.C. 1983 . . . The State merely provides a forum for the litigants and, although lawyers are considered officers of the Court, they are not officers of the State within the meaning of the Civil Rights Act. . ."

In *Brown* v. *Joseph*, 463 F. 2d 1046, (3rd Cir. 1972) the Court of Appeals upheld the dismissal of a civil rights action by a former client against a court-appointed trial attorney employed by the public defender's office of Pennsylvania County. The basis of the decision was twofold: (1) That a private attorney is not a State officer so as to

bring his actions within the purview of the Civil Rights Statute; and (2) That a county public defender whose office is created under State statute enjoys immunity from liability under the Civil Rights Act, even if he was acting under color of State law.

In *Brown* v. *Joseph,* the public defender argued that, once his appointment in a given case is made, his public or State function ceases and that thereafter he functions purely as a private attorney; that his professional relationship with his client takes on all the incidents and considerations attendant upon a private attorney-client relationship; that every aspect of his professional relationship to his client within the framework of ethical representation thereof which conceivably could form the subject matter of a claim under 1983 is performed by him not as a representative of the State under color of State law but in the context of a private practitioner.

Although the Court of Appeals for the Third Circuit did not rest its decision upon this contention (preferring to rest it upon the immunity ground), it noted that the argument had considerable persuasion. (at Page 1047)

Other cases holding that an attorney is not acting under color of State law, whether retained or appointed, are: *Dyer* v. *Rosenberg,* 434 F. 2d 648, (9th Cir. 1970); *Fletcher* v. *Hook,* 446 F. 2d 14 (3rd Cir. 1971); *Mulligan* v. *Schlachter,* 389 F. 2d 231 (6th Cir. 1968); *Brown* v. *Duggan,* (D.C. Pa 1971) 329 F. Supp. 207.

B.

THE CONVICTIONS ARE AN UNCONSTITUTIONAL APPLICATION OF 18 U.S.C. 242.

The facts adduced to sustain the convictions on the two counts were as follows:

The Cadle Count

The defendant had been appointed to represent Cadle on a charge of assault and battery with intent to kill. After his appointment, he was contacted by Cadle's son who had come from Detroit, Michigan for the express purpose of contributing to his father's defense. At the time he contacted Senak, he did not know Senak was a public defender. Senak told Cadle's son that, if he paid him Five hundred ($500.00) Dollars, he would see to it that his father went to a hospital, otherwise he would go to jail. Cadle's son paid Senak One hundred ($100.00) Dollars. Senak then withdrew his appearance as pauper counsel and appeared as private counsel. Cadle ultimately entered a plea of guilty to a lesser charge of aggravated assault and battery and was sentenced to a term of imprisonment of one (1) to five (5) years. Cadle's son did not pay Senak anymore money.

The Gilarski Count

Miss Gilarski was a friend of Steve Laposi who was charged in the Lake Criminal Court with assault and battery with intent to gratify sexual desires and rape. Senak had been appointed to represent Laposi in the assault and battery with intent to gratify case. Gilarski, at Laposi's direction, contacted Senak. She did not know he was a pauper attorney. Senak told her that, if she hired him, Laposi would have a better chance but that he couldn't guarantee that payment to him would get Laposi

off. She paid Senak various sums of money, at one time three Hundred ($300.00) Dollars, and another time an additional Two hundred fifty ($250.00) Dollars. Senak withdrew his appearance as pauper attorney and appeared as private counsel in the assault and battery with intent to gratify case. The case was tried and Laposi was acquitted. In the rape case, where Senak had never appeared as pauper counsel but always as private counsel, the case was dismissed for want of prosecution.

The uncontradicted evidence was that Senak was authorized to accept money from friends or relatives of persons he had been appointed to represent and to appear as private counsel on their behalf. This practice had been in effect for forty years in the Lake Criminal Court. Senak, during his tenure as public defender, was paid a maximum compensation of Ten thousand ($10,000.00) dollars per year. He was appointed in as many as two hundred and fifty (250) felony cases per year.

The statute under which Senak was appointed, Burns 4-5716, expressly provides that only poor persons are entitled to the appointment of a public defender. If it appears that a poor person has funds to pay for counsel, the county attorney is to sue for recovery of a reasonable sum for the services rendered by the public defender and the sums so recovered go into the General County Fund.

Neither Gilarski or Cadle were under any legal obligation to pay the sums of money to Senak. It is clear that, if Cadle or Gilarski had initiated an action under 42 U.S.C. 1983 against Senak alleging deprivation of property without due process of law, that action would fail, since, in his relationship with Cadle and Gilarski, he was not acting under color of law but merely as a private attorney.

The language of Sec. 242 has been expanded to the point of absurdity in an attempt to authorize this conviction.

If upheld, it would permit the Government to prosecute any State appointed or elected official for any breach of his duties; it would effectively nullify the provisions of the Tenth Amendment to the Constitution in that there would be virtually no police powers reserved to the States.

C.

THE ADMISSION OF THE STATEMENT AS PAST RECOLLECTION RECORDED.

The opinion of the Court of Appeals concedes that there are no cases where a statement admitted as past recollection recorded was made as long as three years after the event. (Opinion p. 18)

The opinion of the Court of Appeals also concedes that there was sufficient additional incriminatory information in the statement that it could scarcely say that it did not add to the Government's case. (Opinion p. 13)

That incriminatory information was devastating; it suggested that Senak was extorting money from Gilarski for the purpose of paying off someone to achieve a desired result. The exhibit was not only read to the jury, but when the jury retired to deliberate the statement went into the jury room.

The admission of the statement was in direct violation of Rule 803 (5) of the Federal Rules of Evidence. Although those rules did not become effective until July 1, 1975, the Seventh Circuit Court of Appeals had, in *U.S.* v. *McCarthy*, 445 F.2d 587, 591 (7th Cir. 1971) expressed the belief that the proposed rules should be used by the District Courts as guidelines and at least given consideration in the exercise of their discretion in making evidentiary rulings. (Opinion P. 12)

The opinion of the Court of Appeals establishes a startling precedent by stating

> ". . . The fact that there is no rule other than the credibility scrutiny of the trier of fact, which curtails the lapse of time applicable to the live witness on the stand, would suggest that we should not arbitrarily say any given length of time is too long for the statement-giver to have an accurate memory and for a proper application of the past recollection recorded procedure." (Opinion p. 18)

D.

PREJUDICIAL ARGUMENT BY THE GOVERNMENT.

By the time this case was submitted to the jury, it was not clear whether the defendant was being tried for violation of the Civil Rights Statute or for income tax evasion. At every conceivable opportunity, beginning with the cross-examination of Judge McKenna, continuing with the cross-examination of the defendant and culminating in the final argument, the Government attempted to tarnish Senak with the suggestion of income tax evasion.

In his concurring opinion, Chief Judge Fairchild viewed the cross-examination of Judge McKenna

> ". . . as the type of questionable conduct Government counsel should avoid . . . this seems to me gossamer covering for the prosecutor's real hope that the jury will view the witness less favorably because he was charged, though not convicted, with income tax evasion." (Opinion p. 34)

The opinion of the Court of Appeals does not find the remarks made by Government counsel so prejudicial as to necessitate reversal, primarily because

> ". . . The comment anent the subpoena was the culmination of the opening defense gambit that Senak did not require a subpoena to produce his records." (Opinion, p. 9)

This observation ignores the fact that it was the Government which first injected the income tax issue into the trial of the case. The cross-examination of Judge McKenna has already been alluded to. The defendant Senak was vigorously cross-examined on his income tax returns and the Government was permitted to show, over constant objection, that Senak had failed to report One hundred ($100.00) Dollars of his income in one case and Nine hundred ($900.00) Dollars in another case. Those matters in which he failed to report that income were not subjects of the indictment.

The brief of the defendant filed in the Court of Appeals sets out an unbroken line of authority which holds that a taxpayer under criminal investigation is not required to produce his books and records in the face of a subpoena if he asserts the privilege against self-incrimination. (brief of petitioner, p. 16-20)

The cumulative impact necessarily left the jury with the impression that the defendant had wilfully understated his income and that his conduct in voluntarily cooperating with the Internal Revenue Service was a sham and subterfuge. The Government made the most of the erroneous ruling by the Court by commenting to the jury

> "... That, Ladies and Gentlemen, shows guilty knowledge. That's exactly what it shows. . . ." (R. 829)

The opinion of the Court of Appeals on this issue states

> "All that the prosecutor said was that if one doesn't hand over the records he will be handed a subpoena. We do not agree with the defendant that this necessarily implies more than it says, i.e. that he would have had to comply with a subpoena or summons. . ." (Opinion, p. 9)

This interpretation is semantically unrealistic.

The legal definition of a subpoena is almost identical to the lay definition of a subpoena. A subpoena is defined in Webster's New Collegiate Dictionary 1974 as from the Latin *sub poena* under penalty; a writ commanding a person designated in it to appear in court under a penalty for failure.

If all the Government prosecutor intended to convey to the jury was that if Senak were handed a subpoena and all that Senak would have been required to do would be to comply with the subpoena and show up, it would have been a simple matter for him to so state. What the Government prosecutor attempted to convey to the jury and necessarily did convey to the jury was that Senak, after having been handed the subpoena, would have been required to produce his books and records. In the light of the Government's final comment, that such conduct showed guilty knowledge, any other interpretation is patently unrealistic.

CONCLUSION

To permit this conviction to stand would enable the Government to act as national policemen in every conceivable area of alleged criminal activity. The judicial impact of the opinion of the Court of Appeals will have far-reaching consequences. Local law enforcement agencies and bar associations are more appropriate forums to examine the transgressions in this particular case.

Respectfully submitted,

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